FILED
SEP 15 1988

No. 87-1165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE STATE OF CALIFORNIA, THE STATE OF ARIZONA, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, and COACHELLA VALLEY WATER DISTRICT,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. Introduction

The respondents' briefs attempt to blur the subject matter for the sovereign immunity waivers provided by (1) the Quiet Title Act (28 U.S.C. §2409a ("QTA")) for land ownership disputes with the United States and (2) the Administrative Procedure Act (5 U.S.C. §702 ("APA" or "Section 702")) with respect to actions of federal officials for which an exclusive remedy has not already been provided by Congress. The United States' current analysis of the appropriate spheres of applicability of these two statutes contra-

dicts its *ante litem motam* analysis presented to this court in *Block v. North Dakota*, 461 U.S. 273 (1983), and to the District Court below. This reversal of field is unembarrassed by any plausible explanation whatsoever. In this reply the State Parties provide some practical examples as to why Congress intended the QTA to apply only to claims seeking to divest the United States of some or all of its ownership interests in land, while Section 702 authorizes review of agency management actions with respect to land admittedly owned by the United States, such as the boundary determinations involved here.

In addition, the United States dedicates a substantial portion of its brief to an argument not presented to or decided by the Court of Appeals, namely that the QTA's disclaimer of applicability to water rights claims constitutes an affirmative ban on any such actions other than pursuant to the McCarran Amendment of 1952 (43 U.S.C. §666). In the course of that argument the United States also attempts to expand upon this Court's dictum in *Dugan v. Rank*, 372 U.S. 609 (1963), as to the scope of the McCarran Amendment's sovereign immunity waiver. Consequently, the State Parties respond to those belated arguments.

Finally, the respondents make no persuasive arguments as to why the waiver of sovereign immunity with respect to the boundary components of the United States' *Winters* claims for the Indian reservations in *Arizona v. California*, 373 U.S. 546 (1963) ("*Arizona I* ") should not be extended to the State Parties' District Court action.

II. Respondents Fail to Recognize the Distinction Between Suits Challenging (1) the United States' Underlying Ownership Interests in Disputed Lands and (2) the Actions of Federal Officials Regarding Land Admittedly Owned by the United States.

The State Parties contend that the proper analysis of the relationship of the QTA to Section 702 in federal land matters was presented to this Court by the United States in *Block v. North Dakota* as follows (S.P. Br. at 30):

> Of course, Section 702 allows challenges to the administration of federal lands on the ground that the actions complained of violate procedural or substantive restrictions imposed by applicable law. But the amendment to the APA was never conceived of as affording a vehicle for questioning the underlying title.

The State Parties' action does not "question" the United States' underlying title to the disputed lands, but only the Secretary's "administration" of those lands, *i.e.*, his erroneous interpretation of the 1870 executive order by which the President segregated certain public lands for administration as a military reserve (later as an Indian Reservation) from other lands that were to remain subject to the public land laws.

After the decision in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II* "), made it clear that the State Parties' District Court suit did not involve a challenge to the United States' "underlying title" to the disputed lands, the United States correctly applied the distinction it had recognized in *Block* and amended its motion to dismiss the State Parties' suit

by withdrawing its sovereign immunity defense to those claims which sought only a boundary determination, with the following explanation (S.P. Br. at 12):

> Where the action merely questions the accuracy of the determination of reservation boundaries, and the legal title to the lands is not at issue, we think the action may go forward pursuant to the Administrative Procedure Act.

The United States' brief here does not mention its position in *Block* and, with respect to its amended motion to dismiss, simply notes that after the decision in *Arizona II* (and also after *Block*) "the United States withdrew most of the objections that it had raised" before the District Court. U.S. Br. at 10. It asserts that its reversal of position was based on *Fadem v. United States*, 791 F.2d 1381 (9th Cir. 1986), and *Florida Dep't of Business Regulation v. United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985), and "their elaboration upon the teachings of [*Block*] and *United States v. Mottaz*, 476 U.S. 834 (1986)." *Id.* at 11. The State Parties believe that the real motivation for the United States' switch of position was not that it had "seen the light", but rather that it had "felt the heat" from the stinging rebuke delivered to its handling of the Fort Mojave boundary issue by the District Court's decision invalidating the Secretary's Fort Mojave order. In any event, its initial *ante litem motam* analysis is the correct one and none of the four cases on which the United States relies support modification of that position.[1]

[1] The non-applicability of *Block, Mottaz and Florida* to the State Parties' action is dealt with in our initial brief. S.P. Br. at 30-31. *Fadem* involved an action brought by parties whose land title was clouded by a boundary resurvey. As such it was exactly the kind of title dispute to which Congress intended the QTA to apply (See S.P. Br. at 29) and was correctly decided. The State Parties dispute only its dictum that the QTA governs "*all* boundary disputes with the Government" (791 F.2d at 1383 (emphasis added)), which was obviously not carefully considered.

The line between the different kinds of federal land disputes to which the QTA and the APA apply can be traced back at least to the report of the Public Land Law Review Commission ("PLLRC") to Congress in 1970. The QTA was a direct outgrowth of a PLLRC recommendation that Congress waive sovereign immunity to permit parties to assert land *ownership* claims against the United States. S.P. Br. at 27-28. But the PLLRC also recommended that Congress waive sovereign immunity to permit challenges to public land *management* decisions by federal agencies in Recommendation 110, which provided that "[j]udicial review of public land adjudications should be expressly provided for by Congress." PLLRC Rept. at 256. The supporting text of this recommendation also noted the concurrent recommendations of the Administrative Conference of the United States for a broader general waiver of sovereign immunity by amendment of the APA. *Ibid.* While the latter proposal progressed through the Judiciary Committees of Congress to enactment in 1976, Recommendation 110 was considered by the Interior and Insular Affairs Committees and eventually also enacted in 1976 as section 1(a)(6) of the Federal Land Policy and Management Act ("FLPMA"), which declares it to be Congressional policy that "judicial review of public

land adjudication decisions be provided by law." 43 U.S.C. §1701(a)(6).

The distinction between "ownership" and "management" issues recognized by both the PLLRC and Congress would be obliterated by the Ninth Circuit's decision and the respondents' contentions. The United States argues that the QTA applies to *any* suit "*concerning* . . . the *nature* of the United States' title" to lands (U.S. Br. at 18 (emphasis added)) or "the *general* subject matter" of the QTA (*Id.* at 24 (emphasis added)), *i.e.*, federal lands. Similarly, the Tribes assert that the QTA "applies to a *broad range of claims* other than claims to title" and "was intended to govern *all* other disputes over the real property interests of the federal government [other than security interests and water rights]" (Tr. Br. at 37-38 (emphasis added)).

The respondents' expansive interpretation of the QTA would in essence amend Section 702 to preclude its applicability to most federal land management decisions. Thus, the APA would no longer apply to actions which have traditionally been brought under its provisions, both before and after the addition of the sovereign immunity waiver to Section 702 in 1976, to review decisions under the public land laws dealing with such matters as federal land exchanges,[2] rights-of-way across federal lands,[3] denials of public land patents under the Mining Law of 1872,[4] issuance of federal mineral leases on the Outer Continental Shelf

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[2] *National Coal Ass'n v. Hodel*, 825 F.2d 523 (D.C. Cir. 1987).

[3] *City and County of Denver v. Bergland*, 695 F.2d 465 (10th Cir. 1983).

[4] *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970).

or onshore,[5] sales of National Forest timber[6] and other similar "management" decisions granting, denying or adjusting statutory rights or privileges in the public lands. All such actions, to varying degrees, "concern" or "affect" the "nature" of the United States' title to federal lands, and some may even divest it of all or some of that interest, *e.g.*, if the United States is held obligated to issue a fee title patent under the Mining Law of 1872 or a lesser right-of-way interest under FLPMA. But none of those management disputes question the United States' underlying title to the lands prior to the management decision in dispute. Moreover, actions relating to Indian lands, which are also reviewable under the APA[7], would be wholly insulated from review, inasmuch as all such disputes affect what the United States describes as "the solemn obligations of the United States to the Indians" (U.S. Br. at 14) and "the solemn commitments made by the United States to the Fort Mojave Tribe in the 1890 Executive Order, *as now construed by the United States*". *Id.* at 34 (emphasis added). The State Parties emphasize that they do not seek to undermine any commitment the United States has made to the Tribes in creating their reservations, but simply to have a fair determination of the scope of that commitment pursuant to procedures consistent with traditional concepts of due process.

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[5] *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983).

[6] *West Virginia Div. of the Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975).

[7] *See, e.g., Southern Pacific Trans. Co. v. Watt*, 700 F.2d 550 (9th Cir.), *cert. denied* 464 U.S. 960 (1983).

Congress obviously did not intend the QTA to be the exclusive vehicle to review the myriad of federal agency land management actions applicable to the one third of the nation's land owned by the United States. As the United States recognizes (U.S. Br. at 23, n. 15), Congress knew the difference between a quiet title action and a suit for review of federal agency action. So did the Justice Department at that time, just as it did later in its arguments before this Court in *Block* (page 3 *supra*). Assistant Attorney General Ruckelshaus' testimony in 1970 opposing the Administrative Conference's proposed APA sovereign immunity waiver clearly distinguished Senator Church's then pending quiet title bill from that proposal:[8]

> In the Department of Justice the Lands Division has a recommendation, now in the Deputy's Office, to support in principle the Church bill. . . . The idea of sovereign immunity should not be raised as a defense by the Government in an action to quiet title, *to determine who owns land*. And I think that that is the kind of approach that we would favor in this area. What we are afraid of is that if you open up the *whole decisionmaking process* of the administrative branch to judicial review by the courts by removing the defense of sovereign immunity, we are likely to get a flood of cases in spite of what has been said.

The Section 702 waiver was to be the mechanism for review of agency management actions affecting

[8] *Hearing on S. 3658 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. 66 (1970) (emphasis added).

all federal lands, including Indian lands. The sometimes fine line between the applicability of the QTA and the APA in federal land cases can best be discerned by recognizing that the QTA only applies where a party claiming a present interest in certain lands asserts that claim against the United States and seeks a judgment that would divest or diminish the United States' claimed ownership interests. Where a plaintiff asserts no such interest, as here, and seeks only to invalidate an adverse federal management action, the QTA is obviously not applicable and Section 702 is the appropriate vehicle for judicial review.

The United States mistakenly equates the lack of a remedy under the QTA as an implied denial of any other remedy. But, as this Court explained in *Block*, Section 702 of the APA is only inapplicable "when Congress has dealt in *particularity* with a claim and [has] intended a specified remedy to be the exclusive remedy". 461 U.S. at 286, n. 22 (emphasis added). That is plainly not this case. Clearly, if Congress has not provided a remedy in the QTA for the State Parties' unique boundary claim, nothing in that Act "expressly or impliedly forbids the relief which is sought" so as to preclude the applicability of Section 702. The proper analysis was applied in *City of Sault Ste. Marie, Mich. v. Andrus*, 458 F.Supp. 465 (D.D.C. 1978). In that case the City challenged the Secretary of the Interior's acceptance of certain Indian owned lands in trust, the result of which was to deprive the City of taxing power over such lands. The court recognized that the City was asserting a jurisdictional, not a title interest and rejected the United States' argument as to the preclusive effect of the QTA's Indian lands exemption (*id.* at 471-72):

Since plaintiffs do not possess the type of property right which would be necessary for the maintenance of a quiet title action, it is clear that 28 U.S.C. §2409a is inapplicable to this suit, and may not, therefore, force dismissal of this suit due to the doctrine of sovereign immunity.

III. If the QTA is Applicable to the District Court Action, the Facts of this Case Require Application of the *Spaeth* Rule.

Respondents contend that the Eighth Circuit's decision in *Spaeth v. United States Secretary of the Interior*, 757 F.2d 937, *reh'g and reh'g en banc denied* (1985), that the United States must demonstrate a "substantial possibility" that disputed lands are "Indian trust lands" in order to invoke the QTA's exemption for such lands was based on the "unusual facts" of that case which are not present here. U.S. Br. at 39-40; Tr. Br. at 42-43. However, both cases involved a cloud on the title of the plaintiffs' property—the Spaeths' land, which they had owned for 30 years and which the Secretary had formally advised them (as a result of a changed Solicitor's opinion) was very likely actually Indian lands, and Metropolitan's water rights under its water delivery contract with the Secretary, which it has held for over 50 years and which are threatened with substantial reduction because of the Secretary's changed boundary interpretation. Both the Spaeths' land interests and Metropolitan's water rights were put in jeopardy by a "sudden and sharp change in the prior understanding of the governing legal principles upon which [they] had relied". U.S. Br. at 39. The equities

in the present case are at least as compelling as those in *Spaeth*.

IV. The QTA Does Not Expressly or Impliedly Forbid Suits Relating to Water Rights.

The QTA expressly provides that it does not apply where the only real property interest claimed by the United States is "a security interest or water rights . . . nor does it apply to or affect actions which may be or could have been brought under section 208 of the Act of July 10, 1952" (the McCarran Amendment). The United States made no argument before the Ninth Circuit that this language is anything other than what it plainly purports to be on its face, namely a disclaimer to make it clear that the QTA does not apply to actions relating to water rights. Consequently, the Ninth Circuit had no occasion to address the United States' novel and belated argument that the disclaimer actually has an affirmative "preclusive effect" that "expressly forbids" suits relating to water rights. U.S. Br. at 13, 26.

This interpretation has no basis in the statute or its legislative history. The Justice Department proposed the language to make it clear that the "real property" interests to which the proposed QTA would apply were lands, not water rights, which are also a species of real property. It explained that actions "involving [or] relating to water rights. . . . are provided for in other provisions of the code", citing the McCarran Amendment (S. Rep. No. 92-575, 92d Cong., 1st Sess. 6 (1971)), and that it did not wish "to disturb existing law" (U.S. Br. at 29). Its only stated purpose was to preserve existing law governing suits against the United States under the McCarran Amendment, whatever its scope might be. The

Justice Department did not represent to Congress that its proposed language would accomplish a statutory ban on all suits "involving or relating to water rights" other than those authorized by the McCarran Amendment, and Congress did not intend the disclaimer to have that distorted, hidden meaning. The relevant issue is whether the McCarran Amendment precludes the applicability of the Section 702 waiver of sovereign immunity to the State Parties' suit, to which we now turn.

V. The McCarran Amendment does not Expressly or Impliedly Forbid the District Court Action.

As we noted in our initial brief (S.P. Br. at 26-27), the State Parties' suit is a unique, hybrid action necessitated because of (1) the special importance of an Indian reservation boundary under the measure of *Winters* water rights announced for Fort Mojave and the other Indian reservations in *Arizona I*, *i.e.*, practicably irrigable acreage, and (2) this Court's decision not to adjudicate the disputed boundary issues in *Arizona II*. Although a determination of the boundary will have an impact on the Tribes' putative *Winters* rights, it is not a "general stream adjudication" which this Court stated in *Dugan v. Rank*, 372 U.S. 609 (1963), is the limit of the McCarran Amendment's waiver of sovereign immunity.

The United States argues, again for the first time in this dispute, that the McCarran Amendment was intended to be the exclusive means for *any* action to "adjudicate" water rights. The United States relies solely on an Administrative Conference memorandum submitted to the Senate Judiciary Committee in 1970 which stated that "[s]pecial statutory remedies . . . such as those dealing with . . . *water rights*, and the

like retain the same preclusive effect on other remedies *that they have now*." U.S. Br. at 28 (emphasis added). But the second emphasized phrase makes it clear that the intent was simply to preserve the status quo. The same is true of the statement of then Assistant Attorney General Scalia cited by the United States (U.S. Br. at 22), which obviously was not intended to prejudge the scope of any particular existing remedies. Conceding that Congress should be presumed to have been aware of this Court's decision in *Dugan*, it was also therefore aware that the Court applied its then recently announced test for an officer's suit (*Malone v. Bowdoin*, 369 U.S. 643 (1962)) even though it found the McCarran Amendment inapplicable. It did *not* hold that the McCarran Amendment was the exclusive vehicle for a suit challenging federal agency actions which may "relate" to or "affect" water rights, but which does not seek an adjudication of specific federal water rights. Indeed, even before the 1976 APA amendment federal agency actions adversely affecting water rights could be challenged by an officer's suit, a fact stressed by the Justice Department in the hearings on the McCarran Amendment in urging that the proposed legislation was unnecessary.[9] Since this Court has not viewed the McCarran Amendment as precluding officer's suits relating to water rights issues, neither does it preclude review under Section 702, contrary to the conclusion in *Block* as to the preemptive effect of the QTA in quiet title adjudications. That is the express

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[9] *Hearings on S. 18 Before a Subcommittee of the Senate Judiciary Committee*, 82d Cong., 1st Sess. 19-20 (1951).

holding in *South Delta Water Agency v. United-States.*[10]

Contrary to the United States' assertions, the State Parties do not "seek to divest the United States of its legal title to (and the Tribe of its equitable interest in) all reserved water rights for the 3500-acre [disputed] tract [adjacent to the Fort Mojave Reservation]." U.S. Br. at 15. The United States presently has no reserved water rights for those disputed lands, even though the Secretary is permitting the Tribe to allow a third party to use water on those lands in violation of the decree in *Arizona I*, as the Tribes concede. Tr. Br. at 6. Its efforts to have this Court make such an allocation were rejected in *Arizona II*. All that the State Parties seek is review of a boundary determination which the United States asserted as the basis for its *Winters* claim for the disputed lands rejected in *Arizona II*. As a result of this Court's decision of the scope of the *Winters* right for the Fort Mojave Reservation in *Arizona I*, the boundary determination obviously has water rights implications, but a review of its legality is not a water rights "adjudication" of the kind covered by the

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[10] 767 F.2d 531, 542 (9th Cir. 1985). See also *Joint Board of Control of the Flathead, Mission and Jocko Irr. Dists. v. United States*, 832 F.2d 1127 (9th Cir. 1987), *cert denied* 56 U.S.L.W. 6789 (U.S. May 17, 1988) and *Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 763 F.2d 1032 (9th Cir. 1985). The United States' attempt to distinguish these cases from the State Parties' suit (U.S. Br. at 30) is not persuasive. Like *Dugan*, they involved challenges to agency action adversely affecting water rights, but not seeking a general adjudication. However, whereas *Dugan* found that the *Malone v. Bowdoin* elements necessary for an officer's suit were not present, the Ninth Circuit decisions found Section 702 applicable.

McCarran Amendment. Indeed, the United States concedes that the State Parties "do not request the district court actually to adjudicate *any* party's water rights as such". U.S. Br. at 27.

Moreover, even if the McCarran Amendment were the only available avenue for the relief sought by the State Parties, we believe that the District Court action is not incompatible with its consent provisions. First, in *United States v. District Court for Eagle County*, 401 U.S. 520 (1971), this Court stated that the *Dugan* interpretation of the scope of that Act should not be applied in an "extremely technical" fashion. *Id.* at 525. Second, all other rights on the Lower Colorado River, other than these three remaining Indian reservation claims, have already been adjudicated in *Arizona I and II*. Consequently, like the Colorado supplemental proceedings in *Eagle County*, there is no need for any other parties other than those who are here. The District Court action is as "comprehensive" as is appropriate.

Prior to the McCarran Act, all water rights litigation on western stream systems was "piecemeal" unless the United States decided either to intervene or initiate its own action to permit the adjudication of federal rights. The McCarran Amendment was designed to end that inequitable situation. But the United States would turn the sword which Congress gave the states to facilitate water rights adjudications into a shield to prevent the resolution of the three remaining unquantified federal water rights on the Lower Colorado River. Permitting the State Parties to take the first step necessary to finally conclude the comprehensive adjudication of Lower Colorado River Basin water rights initiated over 35 years ago

in *Arizona v. California* is fully consistent with the purpose of the McCarran Amendment.

VI. The Respondents Offer No Valid Reasons why the United States' Waiver of Sovereign Immunity in *Arizona v. California* Should not Extend to the District Court Action.

In our initial brief the State Parties invited the respondents to identify any public interest that would be endangered by applying the principle in *Luckenbach S.S. Co. v. The Thekla*, 266 U.S. 328 (1924), to extend the waiver of sovereign immunity resulting from the United States' claims in intervention in *Arizona I* to the District Court action to adjudicate the boundary components of those claims. S.P. Br. at 20. The United States' several arguments stressing lack of express statutory authority for our proposal are irrelevant to the question of whether the *judicially* created *Thekla* rule should be extended. The United States does argue that it did not intend such a result when it intervened in *Arizona I*. U.S. Br. at 47, n. 34. To that we respond as Justice Holmes did in *The Thekla*: "[The Government] joined in the suit, and that carried with it the acceptance of whatever liability the *courts* may decide to be *reasonably incident to that act*". 266 U.S. at 341 (emphasis added). Arizona did not expect, when it sued California in 1952, that the United States would intervene and assert sweeping *Winters* claims based on all the practicably irrigable acreage on all the Indian reservations in the Lower Colorado River Basin, which is the unprecedented legal principle which has made the proper location of reservation boundaries so critical. For the United States to drop that bombshell on the State Parties in *Arizona I* and then actively frustrate the

State Parties' efforts over the past ten years to resolve the disputed boundary issues is unconscionable.

The Tribes argue that the State Parties' proposal "could open the door for virtually unlimited waivers of the United States sovereign immunity in the federal courts whenever the Government has invoked the original jurisdiction of this Court." Tr. Br. at 24. However, it is highly unlikely that the expanded *Thekla* rule would be invoked very often, inasmuch as when the United States initiates or intervenes in a suit all issues are almost always finally resolved in that proceeding. The State Parties would hope that the present example of deplorable litigation conduct on the part of the United States is relatively rare. Moreover, the applicability of the rule could readily be limited by appropriate conditions. As we indicated in our initial brief (S.P. Br. at 19-20), it would only apply to the extent a party, as here, was not seeking affirmative relief beyond that presented by the initial waiver. Other limitations could be structured, such as limiting it to suits brought by parties to the original action which triggered the waiver, as in the instant case.

Finally, the professed concern of the Tribes (Tr. Br. at 25) and the United States (U.S. Br. at 31) that the State Parties' position would foster undesirable "piecemeal" litigation of federal water rights is belied by their track record over the past 15 years with regard to the Indian boundary disputes at issue here. For the same reason, the State Parties find astoundingly incredible and place no credence in the United States' assertion that it "has no interest in delaying a final resolution of the boundaries of the three Reservations" (U.S. Br. at 16) and that "[i]f the judg-

ment of the court of appeals is affirmed, the United States will promptly consider what further steps it should take to bring about an expeditious and final resolution of the boundary issue". *Id.* at 49.

VII. There is a Present, Imperative Need to Resolve the Boundary Disputes.

The United States contends that there are no "compelling circumstances" justifying permitting the District Court action to go forward (U.S. Br. at 49) and that affirmance of the Ninth Circuit "would not have a substantially adverse effect" on the State Parties. *Id.* at 15. This is nonsense, and is simply a modified version of the standing arguments that the United States belatedly raised before the Ninth Circuit. See S.P. Br. at 12, 13, 47-49. Similarly, the Tribes assert that "the unresolved status of the boundaries imposes no burden on Metropolitan, which, as Special Master Tuttle noted, has not even bothered to address the possibility of increased awards of water to the Tribes." Tr. Br. at 43, n. 34. This is also false. Metropolitan faces an imminent curtailment of its Colorado River supply in the near future. S.P. Br. at 8. It has been engaged for a number of years in efforts to replace that lost supply, including a variety of arrangements with other Colorado River users in California. It has proposed legislation that would authorize the lining of the All American Canal in California to conserve as much as 100,000 acre-feet of water annually, most of which would become available to Metropolitan. See H. Rept. No. 100-780, 100th Cong., 2d Sess. 20-28 (1988). Similarly, Metropolitan has been in negotiations with Imperial Irrigation District to finance the improvement of Imperial's distribution system to conserve presently wasted water

which would be made available to Metropolitan. In a recent decision the California Water Resources Control Board required Imperial to initiate additional conservation efforts on its system and noted that Metropolitan had a substantial present need for the conserved water:[11]

> "As the result of wet conditions on the Colorado River since 1983, MWD has been able to divert close to the 1.3 million acre-foot capacity of its Colorado River aqueduct in each of the last five years. . . . Due to the development of the Central Arizona Project and other factors, however, the quantity of Colorado River water available for diversion by MWD on a dependable basis will be restricted to the quantity available under its fourth priority right of 550,000 acre-feet per annum. This quantity is reduced further by approximately 30,000 acre-feet per annum due to current levels of use by other holders of present perfected rights. There is a possibility of additional reductions in the quantity of water available to MWD due to increased use by Indian tribes. . . . The Central Arizona Project began deliveries in 1985 and is expected to utilize its full apportionment in about 1992. . . . Without the development of additional supplies, the record indicates that MWD faces a potential system-wide shortfall during dry periods of 560,000 acre-feet per annum by the year 2000, in-

[11] *In the Matter of Waste and Unreasonable Use of Water By Imperial Irrigation District* (September 7, 1988) at 10. (Record citations omitted).

creasing to 980,000 acre-feet per annum by 2010."

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September 15, 1988